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In the Supreme Court of the United States

OCTOBER TERM, 1974

CHARLES D. McCORKLE, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To: The Honorable, the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States.

Petitioner, Charles D. McCorkle, Jr., prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit, entered February 24, 1975, affirming a judgment of conviction against him entered by the United States District Court for the Northern District of Illinois, Eastern Division.

OPINIONS BELOW

The Opinion of the United States Court of Appeals entered April 8, 1974, is not reported, but is printed in full as Appendix A to this Petition.

The Opinion of the Court of Appeals on rehearing *en banc* entered February 24, 1975, is not reported, but is printed in full as Appendix B to this Petition.

JURISDICTION

The Judgment of the Court of Appeals was entered February 24, 1975, and petitioner's timely Petition for Rehearing was denied April 1, 1975 (See Appendix C, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. What is the scope of the "bad purpose or evil motive" which must be found before a person may be convicted of having "willfully" committed an offense under §7203 of the Internal Revenue Code?

2. In a prosecution under §7203 of the Internal Revenue Code, where government witnesses have testified to conversations with defendant containing his admissions respecting the element of willfulness, is defendant entitled to bring out on cross-examination additional parts of the same conversations in which defendant makes declarations concerning his state of mind at the time of the offense?

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.) §7203:

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of sec-

tion 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

STATEMENT OF THE CASE

Petitioner was convicted in the District Court, after a jury trial, of willfully failing to file personal federal income tax returns for three calendar years. The trial was limited to the issue of whether petitioner had "willfully" failed to file returns (See stipulation, Tr 76-77). To sustain its burden of proof on that issue, the government called two employees of the Internal Revenue Service, Powers (Tr 77-81) and Neuhauser (Tr 180-199). Both testified to conversations with petitioner during their investigation in which petitioner had acknowledged his failure to file returns and his awareness of his duty to file returns.

On cross-examination counsel for petitioner attempted to elicit other parts of the same conversations, in which petitioner had given reasons for his failure to file returns. Objections to this line of questioning were repeatedly sustained. Illustrative of the thrust of counsel's inquiry is this question put to Powers, to which the Court sustained objection:

> "And you asked him why he had not filed those returns, did you not?" (Tr 118.)

To preserve the record with respect to these rulings, petitioner offered to prove by cross-examination of the witness Powers that petitioner had said in the initial interview that he did not file because he did not have the money to pay the tax due, and subsequently he did not file because

of his fear of the possible consequences to himself. Petitioner further stated on that occasion that he was very concerned about the possible criminal aspects of his failure to file his income tax returns; he mentioned the possibility of suicide (Tr 319). Petitioner further stated that he was currently involved in a divorce suit with his wife, that joint income tax returns had been prepared for each of the years in question, and that the returns had been signed by his wife, who later removed her signature from the returns (Tr 320).

Petitioner offered to prove by the witness Powers that on July 2, 1969, petitioner had turned over copies of Forms 1040 for 1967 through 1968, signed by petitioner; that the 1964 return also bore the signature of petitioner's wife, who had inadvertently failed to remove her signature from that return as she had from others (Tr 338). At the same time, petitioner also produced a written statement explaining why he had failed to file his returns, setting forth additional information regarding the prior transfer of his residence to his wife, and containing a proposal by petitioner to pay his delinquent taxes at the rate of $400.00 or $500.00 per week (Tr 338).

Petitioner offered to prove by Neuhauser that in a conversation between himself and Neuhauser on November 4, 1969, petitioner had said that his attorney had told him that he was exposed to criminal prosecution for failing to file returns, and that the attorney was unable to advise a course of action which might eliminate the possibility of criminal prosecution. Petitioner said he had the returns in an envelope ready to be mailed, but could not bring himself to mail them because he did not know what course of action the government would take. He envisioned being arrested as soon as the returns were received by the government. Petitioner also stated at that time that, since his returns would have to be mailed without remittance,

the government would place judgments on the properties and jeopardize his business (Tr 341).

The Court refused these offers of proof.

The Court's charge to the jury with respect to the element of willfulness was as follows:

> "Now, it's not contended that the defendant—it is not contended that the defendant was—it is not contested, I should say, that the defendant was required by law to make a return for the year '65 and '66 and '67 charged in the information or that the returns for those years were not timely filed as required by the law. There is no contest as to that. Thus, there is only one factual question for you to determine in this case, only one; namely, whether the defendant's failure to file—failures to file were wilful.
>
> "Now, the word 'wilful' has a number of different meanings depending upon the context in which it is used. As used in this statute—and I am talking now about United States Code, Title 26, Section 7203, the word 'wilful' means voluntary, purposeful, deliberate and intentional, as distinguished from accidental, inadvertent or negligent.
>
> "The failure to act is willfully done if done voluntarily and purposefully and with a specific intent to fail to do what the law requires to be done; that is to say, with a bad purpose to disobey and disregard the law. I charge you that the only bad purpose necessary for the Government to prove in this case is the deliberate intention not to file returns, which the defendant knew he was required to file at the time that he was required to file them.
>
> "The law does require proof of specific intent before the defendant can be convicted. Now, 'specific intent' means more than the general intent to commit the act; to establish specific intent the Government must prove, beyond a reasonable doubt, that Charles McCorkle knowingly did an act which the law forbids, purposefully intending to violate the law and knowing that such act would violate the law. Such intent

may be determined by you from all of the evidence which has been submitted in this case.

"You are further instructed that the willfulness which the Government must prove beyond a reasonable doubt does not require the Government to prove that the defendant had a purpose to evade a tax or to defraud the Government. For example, one might honestly plan and intend to pay the tax revenues due the Government at some future time subsequent to the required filing date and, hence, have no intent to defraud the Government of taxes, but if one intentionally fails to file a return at the time when required by the law with full knowledge that he was required to do so, and it is immaterial whether or not at that time he could or could not pay the tax that was due, I instruct you that this is all that is necessary for the Government to prove to establish the offense of a willful failure to file the tax returns. In other words, lady and gentlemen, the intent to report income and pay the tax sometime in the future is not a defense to the charge of willfully failing to file tax returns. The willful failure to make a return is made an offense under the laws of the United States, without regard to the existence of a tax liability and punctuality is important to the fiscal system and sanctions are imposed by the law to assure punctual as well as faithful performance of one's duties."

Petitioner objected to this charge (Tr 429-434; 523-524).

A divided panel of the Court of Appeals filed an Opinion (App. A, *infra*) reversing the conviction on the grounds that the District Court had unduly restricted the scope of petitioner's cross-examination of the Internal Revenue Service agents and that the instructions had not properly defined the term "willfully", as defined in *United States* v. *Bishop,* 412 U.S. 346 (1973).

On rehearing *en banc* the Court held, *inter alia,* that the District Court had not erred in either respect found by the panel, and it affirmed the judgment of conviction (App. B, *infra*).

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with a decision in another circuit in its interpretation of the Opinion of this Court in United States v. Bishop, 412 U.S. 346 (1973), and is erroneous in that respect.

In *Bishop* the Court held that the term "willfully" has the same meaning throughout the heirarchy of federal tax offenses, I.R.C., 1954, §§7201-7207. The precise issue before the Court was the propriety of a lesser-included offense instruction in a prosecution under §7206(1), but in concluding that such an instruction was improper, the Court necessarily decided what the term means, not simply that it always has the same meaning:

> "The Court, in fact, has recognized that the word 'willfully' in these statutes generally connotes a voluntary, intentional violation of a known legal duty. It has formulated the requirement of willfulness as 'bad faith or evil intent,' *Murdock,* 290 U.S., at 398, or 'evil motive and want of justification in view of all the financial circumstances of the taxpayer,' *Spies,* 317 U.S., at 498, or knowledge that the taxpayer 'should have reported more income than he did.' *Sansone,* 380 U.S. at 353. See *James* v. *United States,* 366 U.S. 213, 221 (1961); *McCarthy* v. *United States,* 394 U.S. 459, 471 (1969).
>
> * * *
>
> "The Court's consistent interpretation of the word 'willfully' to require an element of *mens rea* implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers.
>
> "Until Congress speaks otherwise, we therefore shall continue to require, in both tax felonies and tax mis-

demeanors that must be done 'willfully' the bad purpose or evil motive described in *Murdock, supra.*" 412 U.S. at pp. 360-361.

Bishop explicitly reaffirms the decision of this Court in *United States* v. *Murdock*, 290 U.S. 389 (1933), wherein it was squarely held that "willfully" in this context means something more than "voluntarily". *Murdock*, 290 U.S. at p. 394. It follows irresistibly from this that instructions which permit the jury to conclude that a defendant may be found guilty of "willful" misconduct if he merely acted knowingly or voluntarily are fundamentally erroneous.

Notwithstanding the force of this conclusion, post-*Bishop* decisions in the Ninth Circuit hold that instructions which permit such an inference are good. *United States* v. *Klee*, 494 F.2d 394 (9th Cir., 1974); *United States* v. *Hawk*, 497 F.2d 365 (9th Cir., 1974); *Cooley* v. *United States*, 501 F.2d 1249 (9th Cir., 1974).

The Court below has followed this approach in the instant case, for it is unquestionable that the instructions given by the District Court equate willfulness with mere knowledge of the obligation to file, coupled with a voluntary failure to do so. In that respect the instruction fails to distinguish breach of the civil duty to file from the willful failure to file defined by §7203.

We respectfully submit that, because of the importance of the willfulness requirement in tax prosecutions and the large number of such cases, this Court should clarify the meaning of the term so that district courts and courts of appeals may uniformly apply the proper interpretation.

The need for this Court to speak on the question is intensified by a recent Eighth Circuit case reaching a different conclusion. In *United States* v. *Pohlman*, ... F.2d

..... (1975), printed in full as Appendix D to this Petition, that Court disapproved instructions on willfulness under §7203 very similar to those approved in this case, on the ground that they deprived defendant of her defense that she had failed to file because of pressing demands of her private and public life. *Pohlman* is the logical development after *United States* v. *Bengimina*, 499 F.2d 117 (1974), in which the Eighth Circuit held that "careless or reckless disregard of the law" does not constitute willfulness.

The co-existence of *Pohlman* and the Opinion of the Court below in the instant case, decided less than two weeks apart, to say nothing of the Ninth Circuit cases, has created a situation which cries out for this Court to exercise its unique authority. Even if the government should contend that *Pohlman* can be reconciled with this case, that contention should be considered in light of two facts: first, any attempt to reconcile these cases with each other, could not succeed in reconciling any of the decisions with *Murdock* and *Bishop*, which, it appears, are being incorrectly interpreted; second, public confidence in the fair administration of the tax laws may well be endangered by published reports that these cases are at variance. See *U. S. News & World Report*, April 7, 1975, "Tax Rulings", reprinted as Appendix E.

Therefore, we respectfully suggest that this Court should grant the writ on the grounds of public importance and existence of inter-circuit conflict.

2. The decision below raises an important question with respect to the scope of cross-examination available to defendants in federal criminal prosecutions.

The rulings of the District Court which limited petitioner's right to cross-examine government agents were upheld on the grounds that his statements to the agents were irrelevant and did not qualify or explain his admissions. Both these grounds are bottomed on the Court's view that proof of mere knowing and voluntary failure to file returns establishes the offense under §7203. Therefore, the issue can properly be treated as ancillary to Question 1 because it involves the same problem of interpreting "willfully".

Aside from this, we submit that the question is independently of great importance because of its general applicability to criminal cases in the federal courts. The effect of the decision is to restrict more severely than any case we know the right of a defendant to cross-examine his accusers. It permits the government to select the incriminating parts of lengthy interrogations—as happened here—while preventing the jury from hearing other parts which might dull the sting of what came out on direct.

This is in conflict with the general rule that a party has the right to bring out additional parts of a conversation which tend to explain or qualify the parts introduced by his opponent. *Home Benefit Assn.* v. *Sargent*, 142 U.S. 691 (1892). More importantly, in criminal cases, this restrictive rule deprives defendant of his fundamental and well-recognized right to establish defenses, particularly his defense to willfulness, by cross-examination of prosecution witnesses. *Beaudine* v. *United States*, 368 F.2d 417, 424-425 (5th Cir., 1966); *Haigler* v. *United States*, 172 F.2d 986, 988 (10th Cir., 1949).

Unless this Court intervenes, the Opinion below will stand as a precedent which invites emasculation of the right of confrontation by undue limitation of cross-examination.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted,

William A. Barnett
Charles R. Purcell
Attorneys for Petitioner

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

September Term, 1973 September Session, 1973

No. 73-1084

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES D. McCORKLE, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 72-CR-18
BERNARD M. DECKER, *Judge.*

Argued December 7, 1973 — Decided April 8, 1974

Before SWYGERT, *Chief Judge*, CASTLE, *Senior Circuit Judge*, and CAMPBELL, *Senior District Judge.**

SWYGERT, *Chief Judge.* Defendant Charles D. McCorkle, Jr. was convicted of wilfully failing to file federal income tax returns for 1965, 1966, and 1967 in violation of 26

*Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

U.S.C. § 7203.[1] At trial it was stipulated that the defendant had substantial gross income in each of the three years at issue and that he was therefore required to file returns for those years. The evidence was uncontradicted that defendant filed no tax returns for the years 1965, 1966, and 1967. Accordingly, the sole issue before the jury was whether defendant's failure to file was wilful.

The defendant raises several issues for our review, the most important of which are: whether the trial court erred in limiting defendant's cross-examination of the Government's witnesses, two Internal Revenue agents; and whether the court properly instructed the jury on the issue of wilfulness. The defendant charges error in both respects. We agree.[2]

I

In an effort to prove defendant's wilful failure to file, the Government presented testimony from two Internal Revenue Service agents, Joseph Powers, an Internal Reve-

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[1] Section 7203 provides:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

[2] We find defendant's contentions with respect to his motion to suppress certain statements made to agent Powers to be without merit. *United States* v. *Lehman*, 468 F.2d 93 (7th Cir. 1972). In addition, in view of our holding we need not reach the remaining issues presented by the defendant.

nue officer, and Paul Neuhauser, a special agent of the Internal Revenue Service. Both agents testified about statements made by the defendant during the course of conversations conducted by the agents with the defendant during 1969 prior to indictment. On cross-examination the trial court denied defendant's counsel the opportunity to question the agents as to additional statements defendant made to them which allegedly tended to show defendant's lack of wilfulness. The Government contends that the trial court properly limited the scope of the cross-examination in that the testimony of the Internal Revenue Service agents as to these additional statements defendant made to them was inadmissible hearsay. The Government also argues that the testimony sought to be elicited was irrelevant.

Admittedly the statements of defendant testified to by the agents on direct examination were hearsay, but were allowable under the recognized hearsay exception of statements against interest. With respect to the statements by defendant sought to be brought out on cross-examination, the Government properly identifies them as self-serving hearsay declarations. Nonetheless, the principle of verbal completeness prescribes that the defendant may bring out on cross-examination that testimony which might qualify, explain, limit or contradict the portion offered by the Government on direct examination. As the Sixth Circuit stated in *Banning* v. *United States,* 130 F.2d 330, 338 (6th Cir. 1942):

> It frequently happens that on direct examination of a witness as to a conversation, transaction or other matter, counsel will bring out only such parts as are favorable to the party he represents. When this occurs, it is the right of the cross-examiner to put the trial court in possession of the full details respecting the matters within the scope of the direct examination.

Having utilized hearsay statements on direct with respect to the conversations between the defendant and the agents, the Government cannot object to the usage of testimony on cross-examination that brings out the whole of those conversations simply due to the hearsay nature of that testimony.

The Government seeks support from our decisions in *United States* v. *Seyfried*, 435 F.2d 696 (7th Cir. 1970), and *United States* v. *Lehman*, 468 F.2d 93 (7th Cir. 1972). We find those decisions inapposite in resolving the instant appeal, for in neither decision did we confront the problem of verbal completeness. In *Seyfried* we held that the portion of a confession by a third party which exonerated the defendant of any criminal activity was inadmissible due to the fact that the exonerating statement was not a declaration against the third party's penal interest. In *Lehman* we rejected the defendant's attempt to elicit through his witness hearsay statements made to the witness hours after the defendant's confession to Revenue agents; we held that the hearsay declarations did not come within the res gestae exception to the hearsay rule.

The Government urges that the proffered testimony sought to be produced on cross-examination was irrelevant to the issue of wilfulness. Specifically the Government argues that the proffered testimony was not relevant to a showing of defendant's state of mind at the time he failed to file. The Government's view of relevancy is unduly restrictive for it cannot be gainsaid that a defendant's subsequent conduct and statements may tend to show an innocent state of mind at a prior time. Our review of the proffered testimony indicates that it is highly relevant to the determination of defendant's state of mind at the time the returns were due and that the trial court erred in excluding it.

II

The defendant claims that the trial court erroneously instructed the jury on the meaning of wilfulness as utilized in section 7203. It is asserted that the trial court's error emanates from an improper distinction between the meaning of wilfully as used in the tax felony statutes, *e.g.,* 26 U.S.C. § 7201, and as it is used in the tax misdemeanor statutes such as section 7203. Any semantic confusion which previously existed with respect to the meaning of wilfully has been eliminated by the Supreme Court's decision in *United States* v. *Bishop,* 412 U.S. 346 (1973). In *Bishop* it is made clear that there is no distinction in the meaning of "wilfully" as utilized in both tax felony and tax misdemeanor statutes. Accordingly, as used in section 7203 wilfully contemplates "a voluntary, intentional violation of a known legal duty." *United States* v. *Bishop, supra* at 360. The Court in *Bishop,* adhering to its longstanding interpretation of "wilfully" annunciated in *United States* v. *Murdock,* 290 U.S. 389, 398 (1933) and *Spies* v. *United States,* 317 U.S. 492, 498 (1943), noted that proof of wilfulness requires a demonstration of " 'bad faith or evil intent" or " 'evil motive and want of justification in view of all the financial circumstances of the taxpayer.' " 412 U.S. 360.

The asserted erroneous trial court instructions on wilfulness were as follows:

> You are further instructed that the wilfulness which the Government must prove beyond a reasonable doubt does not require the Government to prove that the defendant had a purpose to evade a tax or to defraud the Government. For example, one might honestly plan and intend to pay the tax revenues due the Government at some future time subsequent to the required filing date and, hence, have no intent to

defraud the Government of taxes, but if one intentionally fails to file a return at the time when required by the law with full knowledge that he was required to do so, and it is immaterial whether or not at that time he could or could not pay the tax that was due, I instruct you that this is all that is necessary for the Government to prove to establish the offense of a willful failure to file the tax returns. In other words, lady and gentlemen, the intent to report income and pay the tax sometime in the future is not a defense to the charge of willfully failing to file tax returns. The willful failure to make a return is made an offense under the laws of the United States, without regard to the existence of a tax liability and punctuality is important to the fiscal system and sanctions are imposed by the law to assure punctual as well as faithful performance of one's duties.

• • •

Now, the word "wilful" has a number of different meanings depending upon the context in which it is used. As used in this statute—and I am talking now about United States Code, Title 26, Section 7203, the word "wilful" means voluntary, purposeful, deliberate and intentional, as distinguished from accidental, inadvertent or negligent.

The failure to act is willfully done if done voluntarily and purposefully and with a specific intent to fail to do what the law requires to be done; that is to say, with a bad purpose to disobey and disregard the law. I charge you that the only bad purpose necessary for the Government to prove in this case is the deliberate intention not to file returns, which the defendant knew he was required to file at the time that he was required to file them.

The law does require proof of specific intent before the defendant can be convicted. Now, "specific intent" means more than general intent to commit the act; to establish specific intent the Government must prove, beyond a reasonable doubt, that Charles Mc-

> Corkle knowingly did an act which the law forbids, purposefully intending to violate the law and knowing that such act would violate the law. Such intent may be determined by you from all of the evidence which has been submitted in this case.

The above instructions required a mere finding of an intention not to file returns without more. The court explicitly directed the jury that it need not concern itself with whether the defendant intended to defraud the Government. Moreover, the court's instructions had the effect of eliminating justifiable excuse as a consideration in resolving the issue of wilfulness. The instructions failed to properly charge the jury on the element of wilfulness.[a]

The Government contends that certain of the other instruction given correctly described the element of wilfulness and that consequently the charge taken as a whole was proper. We cannot agree. It is not enough to say that the total charge is rendered proper because the jury may choose to follow the correct statement of the law rather than the incorrect statement of law. Having uttered the incorrect instructions on the element of wilfulness, no additional instruction on wilfulness, albeit correct, could neutralize the misstatement. As the Fifth Circuit has stated: "Instructions to the jury must be consistent and not misleading. The fact that one instruction is correct does not cure error in giving another inconsistent one." *Mann* v. *United States*, 319 F.2d 404, 410 (5th Cir. 1963).

The judgment of conviction is reversed and the case is remanded for a new trial.

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[a] We are aware of course that the trial judge did not have the benefit of *United States* v. *Bishop* at the time the instructions were given.

CASTLE, *Senior Circuit Judge*. I respectfully dissent. The trial court properly limited the cross-examination of the Internal Revenue Service agents to exclude from evidence certain self-serving statements made by the defendant, McCorkle, to the agents. Such statements were inadmissible hearsay unprotected by any exception to that evidentiary rule (unlike McCorkle's admissions to which the agents testified on direct examination). The doctrine of verbal completeness does not have currency in this application, where the self-serving statements are clearly unrelated to the admissions so that it is highly unlikely that the former was ever intended to qualify or to explain the latter. *Cf., United States* v. *Lehman*, 468 F.2d 93 (7th Cir. 1972). Moreover, the testimony sought to be elicited was irrelevant to a showing of McCorkle's state of mind at the time he chose not to file his tax returns. It is most doubtful that a suspect's subsequent statements to government agents would accurately reflect an innocent state of mind at a prior time. It seems more probable to expect that such statements would reflect a self-serving, exculpatory purpose.

Moreover, I cannot agree that the trial court erroneously instructed the jury on the meaning of wilfulness as expressed in 26 U.S.C. § 7203. Wilfulness is satisfied only by a finding that the taxpayer committed "a voluntary, intentional violation of a known legal duty." *United States* v. *Bishop*, 412 U.S. 346, 360 (1973). The Supreme Court explicitly established in *Bishop* a standard of *scienter* for conviction under the statute, as the majority pointed out. The instructions of the trial court fully comported with the Supreme Court's interpretation of the statute. The trial court stated to the jury:

> "the word 'wilful' means voluntary, purposeful, deliberate and intentional, as distinguished from accidental, inadvertent or negligent."

The court further emphasized that the *scienter* requirement could only be met by a finding of a deliberate intention not to file tax returns. The trial court thus properly focused on the pertinent legal duty involved in this case in defining "bad purpose." As the court correctly noted, an intent to evade tax or to defraud the government is legally irrelevant to a finding of the intentional violation present in this case, as is a justification based on either inability to pay taxes or an intention to report and pay taxes some time in the future.

Respectfully, I would affirm the judgment of the trial court.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 73-1084

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES D. MCCORKLE, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 72 CR 18
BERNARD M. DECKER, *Judge.*

Argued *en banc* December 10, 1974 —
Decided February 24, 1975

Before SWYGERT, *Chief Judge,* CASTLE, *Senior Circuit Judge,* FAIRCHILD, CUMMINGS, PELL, STEVENS, SPRECHER and TONE, *Circuit Judges.*

CASTLE, *Senior Circuit Judge.* Defendant Charles D. McCorkle, Jr. was convicted by a jury of willfully failing to file federal income tax returns for 1965, 1966 and 1967

in violation of 26 U.S.C. § 7203.[1] The sole issue before the jury was whether McCorkle's failure to file was willful.

On appeal, a panel of this court reversed McCorkle's conviction, holding that the trial court incorrectly instructed the jury on the issue of willfulness and erred in limiting McCorkle's cross-examination of two Internal Revenue Service agents. Subsequently, a majority of the active judges on this court voted to rehear the case en banc. After carefully reviewing McCorkle's contentions, we affirm his conviction.

I.

McCorkle argues that in order to find that he willfully failed to file his tax returns, *United States* v. *Bishop*, 412 U.S. 346, 361 (1973) requires an intent to defraud the Government or other similar "bad purpose or evil motive." He asserts, therefore, that the trial court's instructions [2] directing the jury that it need not be concerned with

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[1] That section provides:

> Any person required under this title to pay an estimated tax or tax, required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015) keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

[2] The instructions on the element of willfulness were as follows:

> You are further instructed that the wilfulness which the Government must prove beyond a reasonable doubt does not require the Government to prove that defendant had a purpose to evade a tax or to defraud the Government. For example, one might honestly plan and intend to pay the tax revenues due the Government at some future time subsequent to the

whether the defendant intended to evade taxes or defraud

(footnote continued)

required filing date and, hence, have no intent to defraud the Government of taxes, but if one intentionally fails to file a return at the time when required by the law with full knowledge that he was required to do so, and it is immaterial whether or not at that time he could or could not pay the tax that was due, I instruct you that this all that is necessary for the Government to prove to establish the offense of a willful failure to file the tax returns. In other words, lady and gentlemen, the intent to report income and pay the tax sometime in the future is not a defense to the charge of willfully failing to file tax returns. The willful failure to make a return is made an offense under the laws of the United States, without regard to the existence of a tax liability and punctuality is important to the fiscal system and sanctions are imposed by the law to assure punctual as well as faithful performance of one's duties.

Now, the word "wilful" has a number of different meanings depending upon the context in which it is used. As used in this statute—and I am talking now about United States Code, Title 26, Section 7203, the word "wilful" means voluntary, purposeful, deliberate and intentional, as distinguished from accidental, inadvertent or negligent.

The failure to act is willfully done if done voluntarily and purposefully and with a specific intent to fail to do what the law requires to be done; that is to say, with a bad purpose to disobey and disregard the law. I charge you that the only bad purpose necessary for the Government to prove in this case is the deliberate intention not to file returns, which the defendant knew he was required to file at the time that he was required to file them.

The law does require proof of specific intent before the defendant can be convicted. Now, "specific intent" means more than general intent to commit the act; to establish specific intent the Government must prove, beyond a reasonable doubt, that Charles McCorkle knowingly did an act which the law forbids, purposefully intending to violate the law and knowing that such act would violate the law. Such intent may be determined by you from all of the evidence which has been submitted in this case.

the Government precluded the jury from determining that his failure to file was not willful.

Prior to the Supreme Court's decision in *Bishop*, this court was confronted with the same argument as is presented here in *United States* v. *Matosky*, 421 F.2d 410 (7th Cir.), *cert. denied* 398 U.S. 904 (1970). In finding no error in the instructions on willfulness in that case, we held that:

> [T]he defendant's motive need not be restricted to an intent to defraud the Government in order for there to a violation of § 7203. Rather, the Government has proven its case when it has established beyond a reasonable doubt: that the defendant was required to file a return; that he knew that he was so required; and that he willfully or purposefully, as distinguished from inadvertently, negligently, or mistakenly, failed to file such a return. His reasons for failing to so file are irrelevant under § 7203, so long as the above facts are shown. *Id.* at 413 (Footnote omitted).

Thus, *Matosky* established that in order for the violation to be willful, the government need only prove a deliberate intention not to file returns which the defendant knew should be filed. Although *Bishop* disapproved our statement that the meaning of willfulness under the tax felony statutes would differ from its meaning under such tax misdemeanor statutes as § 7203, we believe the definition of willfulness enunciated in *Matosky* complies with the uniform meaning adopted by the Court in *Bishop*.

In *Bishop*, the Court held that "willfully" has the same meaning in both tax misdemeanor and tax felony statutes. The Court stated that the word "willfully" in these statutes "generally connotes a voluntary, intentional violation of a known legal duty," 412 U.S. at 360, and went on to rule that "we therefore shall continue to require, in both tax felonies and tax misdemeanors that must be done 'willfully,' the bad purpose or evil motive described in [*United States* v. *Murdock*, 290 U.S. 389 (1933)]." 412 U.S. at 361.

Contrary to the defendant's contentions, we believe that the Court employed the terms "bad purpose" and "evil motive" as a convenient method of referring to the longer definition of "willfully" as a "voluntary, intentional violation of a known legal duty," and not as engrafting an intent to defraud requirement or other similar evil purpose on that definition. Examination of the bad purpose or evil motive described in *Murdock* supports this conclusion.

The defendant in *Murdock* refused to supply information concerning his tax liability to federal revenue officials, fearing that such information would lead to prosecution under state law. Subsequently, the defendant was prosecuted for willfully failing to supply information under a statutory predecessor to § 7203. His defense was that he relied in good faith on his privilege against self-incrimination, and that therefore his refusal to supply the information requested could not be termed "willful." The trial court, in its charge to the jury, stated that it believed the defendant to be guilty.

The Supreme Court, in affirming the appellate court's reversal of the defendant's conviction, held that the trial court judge had improperly expressed his opinion that the defendant was guilty. The Court arrived at this result because it first concluded that to find that the defendant willfully violated the statute, it must be found that the defendant acted not only voluntarily, but also with "bad faith or evil intent." 290 U.S. at 398. Then, because it was not undisputed or admitted that "defendant's assertion of the privilege was so unreasonable and ill founded as to exhibit bad faith and establish willful wrongdoing," 290 U.S. at 396, the Court found that the trial court's comment had invaded the province of the jury. The implica-

tion of *Murdock*, therefore, is that had it been undisputed that the defendant knew that his reliance on the privilege was invalid, the trial court's comment would not have constituted error, and the conviction, without any further showing by the government, would have been upheld. Thus, the evil motive described in *Murdock* that would have satisfied the requirement of willfulness would have been the defendant's voluntary refusal to supply information, knowing that such refusal was wrongful.

Cases decided after *Bishop* have also interpreted that decision to mean that willfulness only requires an intentional violation of a known legal duty. *United States* v. *Hawk*, 497 F.2d 365 (9th Cir.), *cert. denied* 43 U.S.L.W. 3195 (U.S. Oct. 15, 1974); *United States* v. *Klee*, 494 F.2d 394 (9th Cir.), *cert. denied* 43 U.S.L.W. 3194 (U.S. Oct. 15, 1974); *United States* v. *Smith*, 493 F.2d 906 (5th Cir. 1974) (dictum). Thus, in *United States* v. *Hawk*, *supra*, at 368, the court found that the thrust of *Murdock* was that the requirement of willfulness is satisfied by proof that the act was done voluntarily and with knowledge that it was wrongful, and concluded that the terms bad purpose and evil motive are merely "convenient shorthand expression[s]" for the required elements of proof. Consequently, we reject the argument that intent to defraud is essential to prove that a violation is willful, and conclude that *Bishop* did not alter the definition of willful as set forth in *Matosky*.

Examination of the instructions in this case shows that in three instances the trial court correctly charged the jury that willfulness requires both an intentional failure to file, and knowledge by the defendant that he was under

a legal obligation to do so.[3] The defendant's contention that other statements in the court's charge might have misled the jury is without merit when the statements are considered in context and in light of the proper instructions that were given.

Finally, McCorkle argues that the instructions had the effect of eliminating justifiable excuse as a consideration in resolving the issue of willfulness. However, as we noted in *Matosky, supra,* at 413, only an inadvertent failure to file or "a bona fide misunderstanding as to [defendant's] . . . duty to make a return" would constitute "justifiable excuses." Since the instructions required the jury to find an intentional violation of a known legal duty, it would have been essential for the jury to conclude that McCorkle's conduct was unjustified. *United States* v. *Kaczmarek,* 490 F.2d 1031 (7th Cir. 1974). We find the trial court's instructions to be proper.

II.

McCorkle next claims that the trial court erroneously limited his cross-examination of two Internal Revenue

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[3] The instructions provided:

1) . . . if one intentionally fails to file a return at the time when required by law with full knowledge that he was required to do so . . . is all that is necessary for the Government to prove. . . .

2) The failure to act is willfully done if done voluntarily and purposefully and with a specific intent to fail to do what the law requires to be done; that is to say, with a bad purpose to disobey and disregard the law. I charge you that the only bad purpose necessary for the Government to prove in this case is the deliberate intention not to file returns, which the defendant knew he was required to file at the time that he was required to file them.

3) . . . the Government must prove beyond a reasonable doubt that Charles McCorkle knowingly did an act which the law forbids, purposefully intending to violate the law and knowing that such act would violate the law.

Service agents by excluding testimony concerning portions of conversations between McCorkle and the two agents after admitting testimony concerning other parts of the conversations during direct examination of the agents. The officers testified on direct examination that McCorkle admitted his failure to file his federal tax returns for the decade 1957-1967 and that he also recalled being advised that he could file his returns without payment or with only partial payment of the tax due. McCorkle further admitted to the agents that copies of purported tax returns for 1959-1960 furnished to a savings and loan association were fictitious, and that amounts representing estimated tax payments supplied to his accountant to present the appearance of diligent tax filing, were also fictitious.

At trial, McCorkle offered to prove that he also told the agents during these conversations that (1) he failed to file because he did not have the money to pay the tax due; (2) he did not file because of the possible criminal consequences arising from his failure to file earlier returns; (3) he did not file because he had been contemplating suicide; (4) he did not file because he feared the government, on learning of his tax liability, would place liens on his property and jeopardize his business; (5) he was involved in a divorce suit with his wife at the time of the investigation and the returns would have been voluntarily filed when the divorce was final; (6) he timely filed all employer's returns; (7) he offered to cooperate with the agents; (8) he offered to pay his civil liabilities; and (9) he kept accurate records of supplemental income, which would have been properly included on his returns.

The statements of McCorkle testified to by the revenue agents on direct examination are hearsay, but are receivable against him as admissions of a party opponent. IV J. WIGMORE, EVIDENCE § 1048 (Chadbourn rev. 1972). The hearsay statements which McCorkle sought to bring out on cross-examination, however, are properly characterized as self-serving, and are generally not admissible. IV J.

WIGMORE, *supra*, at 5; *see United States* v. *Seyfried*, 435 F.2d 696 (7th Cir.), *cert. denied* 402 U.S. 912 (1971). Nonetheless, McCorkle argues that the doctrine of verbal completeness permits him to bring out the whole of the conversations.

The right of a party to offer into evidence the remaining portion of an utterance is, however, not absolute. Wigmore lists two corollaries which limit the exercise of the doctrine of verbal completeness:

> (a) No utterance irrelevant to the issue is receivable;
>
> (b) No more of the remainder of the utterance than concerns the same subject, and is explanatory of the first part, is receivable;
>
> . . . . VII J. WIGMORE, EVIDENCE § 2113, at 524 (3d ed. 1940) (Emphasis and citations omitted).[4]

Applying these corollaries, we find that the proffered testimony was properly excluded.

First, since we have ruled that proof of intent to defraud the government is not required to establish the willfulness necessary for conviction under § 7203, it is apparent that essentially all of the testimony which McCorkle sought to introduce was of no relevance to whether McCorkle intentionally failed to file returns knowing that he was legally obliged to do so. The only evidence which might have been relevant was the declaration by McCorkle that he did not have the funds to pay the tax due. That only would have been the case, however, if McCorkle believed that the returns could not be filed without a remittance, but the evidence was undisputed that McCorkle's

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[4] Wigmore also lists a third corollary which pertains to how the testimony is to be treated if admitted.

attorney advised him as early as 1963 that he could file returns without making tax payments at the same time.

Second, the doctrine of verbal completeness is not applicable here because McCorkle's self-serving declarations do not qualify or explain his admissions. McCorkle contends that the proffered testimony would fully explain his state of mind at the time the returns were due. However, while the excluded testimony might be probative of McCorkle's general state of mind, it does not explain or qualify the mental state relevant for conviction under § 7203. Thus, the conversations at issue resemble the report in *Gencarella* v. *Fyfe,* 171 F.2d 419, 422 (1st Cir. 1948), where the court, in admitting into evidence only portions of a police report, dismissed an argument based on the doctrine of verbal completeness, observing that "the admissible and inadmissible parts of the report were readily severable from one another, and the separate parts have no bearing to explain or qualify each other." *See also United States* v. *Seyfried, supra,* at 698. Accordingly, we find no error in the trial court's exclusion of the proffered testimony.[5]

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[5] It is also claimed that the trial court improperly excluded the results of a polygraph examination of the defendant. As was the case with the testimony sought to be elicited on cross-examination, however, the offer of proof clearly demonstrates that the results of the test were irrelevant to a determination of the defendant's willfulness.

At oral argument, the defendant strenuously urged that the jury should be permitted to consider these extraneous matters in order to permit the jury to exercise its power as "conscience of the community," and to acquit the defendant even though there may be clear evidence of a criminal violation. The jury, of course, is free to exercise this prerogative, but only on facts relevant to the legal issues involved. *See* United States v. Burkhart, 501 F.2d 993, 996-997 (6th Cir. 1974).

III.

The defendant argues that the trial court erred by not suppressing his admission that he failed to file tax returns for 1966, 1967 and 1968 made at a June 20, 1969 meeting with revenue agent Joseph Powers, who was assigned to the Collection Division of the Internal Revenue Service. He asserts that IRS News Release No. 897,[a] issued October 3, 1967, which requires agents of the IRS Intelligence Division to warn taxpayers of their constitutional rights,

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[a] That release provides in part:

> In response to a number of inquiries the Internal Revenue Service today described its procedures for protecting the Constitutional rights of persons suspected of criminal tax fraud, during all phases of its investigations.
>
> Investigation of suspected criminal tax fraud is conducted by Special Agents of the IRS Intelligence Division. This function differs from the work of Revenue Agents and Tax Technicians who examine returns to determine the correct tax liability.
>
> Instructions issued to IRS Special Agents go beyond most legal requirements to assure that persons are advised of their Constitutional rights.
>
> On initial contact with a taxpayer, IRS Special Agents are instructed to produce their credentials and state: "As a special agent, I have the function of investigating the possibility of criminal tax fraud."
>
> If the potential criminal aspects of the matter are not resolved by preliminary inquiries and further investigation becomes necessary, the Special Agent is required to advise the taxpayer of his Constitutional rights to remain silent and to retain counsel.
>
> . . .
>
> IRS said although many Special Agents had in the past advised persons, not in custody, of their privilege to remain silent and retain counsel, the recently adopted procedures insure uniformity in protecting the Constitutional rights of all persons.

Reprinted in 7 CCH 1967 STAND. FED. TAX REP. ¶ 6832.

is applicable to Powers, and that Powers' failure to comply with the procedures provided for in the Release mandates suppression of his admission.[7]

Inquiry into the tax matters of the defendant began with an anonymous telephone call received at the Information Desk of the Intelligence Division of the IRS, alleging that McCorkle had not filed income tax returns for the years 1966-1968. The information was evaluated as having "no criminal potential," and the matter was referred to the Collection Division, which in turn assigned the case to agent Powers. Prior to meeting McCorkle, Powers knew that a routine check had disclosed that the files of the Collection Division did not contain McCorkle's returns. Powers then met with McCorkle on June 20, 1969, identified himself as a revenue officer, but did not warn the defendant of his constitutional rights. Later, McCorkle made his admission. After a second meeting at which McCorkle and his attorney were present, the matter was referred back to the Intelligence Division for criminal investigation.

The defendant argues that although the Collection Division conducts civil investigations, under the circumstances of this case Powers was acting as an agent of the Intelligence Division conducting a criminal inquiry. The defendant concedes that *United States* v. *Dickerson*, 413 F.2d 1111, 1117 (7th Cir. 1969), in which we prospectively required revenue agents to give *Miranda* warnings at the inception of the first contact with taxpayers after the case

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[7] The IRS Intelligence Division enforces the Criminal provisions of the Internal Revenue Code, while the Collection Division conducts civil actions to enforce collection of taxes. *See* 9 J. MERTENS, LAW OF INCOME TAXATION §§ 49.74-49.76 (rev. ed. 1971).

has been transferred to the Intelligence Division, is not applicable here because that case was decided after the meeting between Powers and McCorkle occurred. He urges, however, that even though *Dickerson* does not apply, Powers' failure to follow the IRS Release requires suppression of his admission. *Compare United States* v. *Leahey*, 434 F.2d 7 (1st Cir. 1970) and *United States* v. *Heffner*, 420 F.2d 809 (4th Cir. 1969) *with United States* v. *Lehman*, 468 F.2d 93, 104 (7th Cir.), *cert. denied* 409 U.S. 967 (1972). Assuming without deciding that a failure to follow the procedure outlined in the Release would have that consequence, the argument cannot succeed because the Release applied only to "[i]nvestigation of suspected criminal tax fraud . . . conducted by Special Agents of the IRS Intelligence Division," and thus, where the investigation is not criminal in nature, the Release, like the *Dickerson* rule (413 F.2d at 1116 n.10) does not require warnings.

The facts demonstrate that Powers was not conducting a criminal investigation in disguise. Powers testified that his duties as a revenue officer are to collect delinquent taxes and to pick up delinquent returns. Knowledge that McCorkle's returns were not in the Collection Division files would be essential to those duties, and does not indicate that he suspected criminal activity. The fact that the tip which led to the investigation originated in the Intelligence Division does not make Powers an agent of that Division, especially since the information was evaluated as having no criminal potential. *United States* v. *Robson*, 477 F.2d 13, 17 (9th Cir. 1973). Once the matter was referred to the Collection Division, the Intelligence Division relinquished all control over it, and Powers' investigation was completely independent. The existence of the possibility of criminal prosecution does not turn

Powers' inquiry into one to which the procedures required by the IRS News Release applies. *See United States* v. *Awerkamp*, 497 F.2d 832, 835 (7th Cir. 1974). Accordingly, we find that the trial court properly denied McCorkle's motion to suppress.

IV.

Lastly, McCorkle asserts that the trial court erred by permitting voir dire, in the absence of the jury, as to the relevancy of the testimony of his witness James Donnelly, and by subsequently concluding that the testimony was irrelevant and that the witness should not testify. In *United States* v. *Dellinger*, 472 F.2d 340, 408-409 (7th Cir. 1972), *cert. denied* 410 U.S. 970 (1973), we stated that departure from the normal procedure of allowing the witness to be questioned in ordinary course in the presence of the jury "should be directed only when an intention to engage in prejudicial conduct is clearly shown." The defendant, however, did not object to the procedure employed by the trial court, and the testimony elicited on voir dire was clearly not relevant. Consequently, there was at most harmless error. FED. R. CRIM. P. 52 (a).

The judgment of the district court is affirmed.

AFFIRMED.

SWYGERT, *Circuit Judge*, concurring. Reconsideration of the issue of wilfulness in light of the petition for rehearing, oral argument, a re-examination of the record, and Judge Castle's persuasive opinion has led me to the conclusion that my original view, expressed in the prior opinion in this case, which I authored, was in error. I am willing to agree that the scienter requirement of the statute does not encompass specific intent to defraud the Government, although I do maintain that a purposeful, volun-

tary failure to file a return does in a conceptual sense contain the latent intent to defraud the Government by not reporting income on which a tax may be assessed. A review of the instructions to the jury in this case now convinces me that the element of wilfulness was properly covered by the district judge and that the conviction in this case must therefore be affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
April 1, 1975.
Before
Hon. Thomas E. Fairchild, Chief Judge
Hon. Latham Castle, Sr. Circuit Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. John Paul Stevens, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. Philip W. Tone, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 73-1084 v.

CHARLES D. McCORKLE, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
(72 CR 18)

On consideration of the petition for rehearing and suggestion that this matter be reheard en banc, filed by counsel for the defendant-appellant in the above-entitled case, no judge in active service nor any member of the original panel having requested a vote thereon and no judge having voted to grant the suggestion, and all members of the panel having voted to deny a petition for rehearing,

It Is Ordered that the petition for a rehearing in the above-entitled cause be, and the same is hereby, Denied.

APPENDIX D

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 74-1759

United States of America,

Appellee,

v.

Berentje C. M. Pohlman,

Appellant.

Appeal from the United States District Court for the District of North Dakota.

Submitted: December 11, 1974.
Filed: February 11, 1975.

Before LAY and BRIGHT, *Circuit Judges*, and TALBOT SMITH, Senior District Judge.*

LAY, Circuit Judge.

Berentje C. M. Pohlman, a practicing attorney in Enderlin, North Dakota, was convicted by a jury of willfully failing to file her individual income tax returns for the years 1968, 1969 and 1970 in violation of 26 U.S.C. § 7203. Ms. Pohlman's basic defense was that she served as City Attorney of Enderlin in 1969 and as Mayor in 1970, and that she was so involved and busy in these positions, as well as with certain personal problems, that she did not

*TALBOT SMITH, Senior District Judge, Eastern District of Michigan, sitting by designation.

realize until late in 1970 that she had earned income sufficient to require filing. She maintained all her files and records and when visited by a field auditor of the Internal Revenue Service in early October 1972, she prepared returns for each of the years in question and filed them. On appeal she appears *pro se*, as she did in the trial court, raising several errors.[1] We need only discuss her attack on the instruction given by the trial court concerning the element of willfulness. We find this to have been reversible error and vacate the judgment of conviction and remand for a new trial.

Title 26 U.S.C. § 7203 makes it a misdemeanor[2] when a person "*willfully* fails . . . to make such return [as required by law] . . . at the time or times required by law . . ." (emphasis added). The court declined to give defen-

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[1] Ms. Pohlman contends the trial court erred in permitting Agent Engelmann to relate the conversation which occurred in her office on October 3, 1972, during which she admitted not having filed the returns since she was not informed of her constitutional right to remain silent prior to the conversation. She was not in custody, however, at the time of the conversation and we have frequently held that no warning need be given during a noncustodial investigation. *See United States* v. *MacLeod*, 436 F.2d 947, 950 (8th Cir.), *cert. denied*, 402 U.S. 907, *rehearing denied*, 402 U.S. 990 (1971); *United States* v. *Brevik*, 422 F.2d 449, 450 (8th Cir.), *cert. denied*, 398 U.S. 943 (1970); *United States* v. *Ping*, 407 F.2d 157 (8th Cir. 1969); *Muse* v. *United States*, 405 F.2d 40, 41 (8th Cir. 1968), *cert. denied*, 393 U.S. 1117 (1969); *Cohen* v. *United States*, 405 F.2d 34, 35-40 (8th Cir. 1968), *cert. denied*, 394 U.S. 943 (1969). *See also* cases cited at 405 F.2d 37 n.7.

[2] The defendant was fined a total of $1500.00 and placed on probation for two years.

dant's requested instruction on the meaning of willfulness [3] and, over her specific objection, gave the following:

> The specific intent of willfulness is an essential element of the crime of failure to file an income tax return. The word "willfully" used in connection with this offense means deliberately, and intentionally, and without justifiable excuse, or with the wrongful purpose of deliberately intending not to file a return which defendant knew she should have filed, in order to prevent the Government from knowing the extent of, and knowing the facts material to, the determination of her tax liability.
>
> Defendant's conduct is not "willful" if she acted through negligence, inadvertence, or mistake, or due to her good faith misunderstanding of the requirements of the law. It should be pointed out, however, that disagreement with the law is not a defense. It is the duty of all citizens to obey the law whether they agree with it or not.[4]

She contends that the court's instruction did not adequately define "willfully" as that word is used in § 7203. We agree. The controlling authorities are *United States* v. *Bishop,* 412 U.S. 346 (1973), and *United States* v. *Murdock,* 290 U.S. 389 (1933).

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[3] The requested instruction was:

> 2. Willfulness is an essential element of the crime of which defendant is charged in the indictment. An act is done "willfully" if done purposely with the specific intent to disregard the law, or to do that which the law forbids, and further means an act done with a bad purpose, the existence of specific wrongful intent, and evil motive at the time the crime charged was committed; mere laxity, careless disregard of duty imposed by law, or even gross negligence, unattended by "evil motive," is not probative of willfulness.

[4] This instruction is taken, with minor changes, from 2 Devitt & Blackmar, *Federal Jury Practice and Instruction* § 52.31 (1970).

In *Murdock,* the defendant had refused to supply information to the Internal Revenue Service concerning deductions claimed in his 1927 and 1928 income tax returns. He insisted that the Fifth Amendment permitted him to refuse the information since it would incriminate him under state law. He was charged with and convicted of willfully failing to supply the information. In upholding the reversal of his conviction, the Court discussed the meaning to be given the word "willfully" in tax crime statutes:

> The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose . . . .

290 U.S. at 394.

> Here we are concerned with a statute which denounces a willful failure to do various things thought to be requisite to a proper administration of the income tax law, and the Government, in the trial below, we think correctly, assumed that it carried the burden of showing more than a mere voluntary failure to supply information, with intent, in good faith, to exercise a privilege granted the witness by the Constitution. The respondent's refusal to answer was intentional and without legal justification, *but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense.*

Id. at 397-98 (emphasis added).

In *Bishop,* the Court was faced with the question of whether the word "willfully," as used in those several statutes defining misdemeanor tax crimes, had the same stringent meaning it had been accorded when used in the definition of a felony tax crime. The Court not only found that it did but went on to emphasize the necessity for determining the "bad purpose" articulated in *Murdock:*

> . . . The Court's consistent interpretation of the word "willfully" to require an element of *mens rea* implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers.
>
> Until Congress speaks otherwise, we therefore shall continue to require, in both tax felonies and tax misdemeanors that must be done "willfully," the bad purpose or evil motive described in *Murdock, supra.*

412 U.S. at 361.

Defendant's basic contention is that the court's instruction failed to sufficiently describe the requirement of wrongful intent and evil motive required under the law. Several cases have held both before and after *Bishop* that the specific words "bad purpose" or "evil motive" need not be used by the courts in defining the element of willfulness. *See* cases collected in *Cooley* v. *United States,* 501 F.2d 1249 (9th Cir. 1974), and *United States* v. *Hawk,* 497 F.2d 365 (9th Cir.), *cert. denied,* 95 S.Ct. 67 (1974). What is required, however, is that the instruction convey "the proper notion of specific intent in understandable terms." *United States* v. *Hawk, supra* at 369. As the Seventh Circuit observed in *United States* v. *Matosky,* 421 F. 2d 410, 412 (7th Cir.), *cert. denied,* 398 U.S. 904 (1970), "the only bad purpose or bad motive necessary for the government to prove is a deliberate intention not to file returns which the defendant knew ought to be filed." This court approved such an instruction under § 7203 in *Lumetta* v. *United States,* 362 F.2d 644 (8th Cir. 1966).[5]

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[5] The full instruction in *Lumetta,* however, was later disapproved in a post-*Bishop* case since it erroneously embodied *Murdock* language which allowed a definition of willfulness to include "careless or reckless disregard." *See United States* v. *Bengimina,* 499 F.2d 117 (8th Cir. 1974).

The basic question in the present case is whether the trial court sufficiently and accurately defined the specific intent required. Concededly there is no mention of "bad purpose" as used in *Lumetta* and other cases decided previously by this court. *See also United States* v. *MacLeod*, 436 F.2d 947, 950 (8th Cir.), *cert. denied*, 402 U.S. 907 (1971).

The art of instructing a jury in plain and understandable terms requires, on the part of the trial judge, an acute awareness of the extraordinary demands made upon him in the skill of communication. In many trial courts the practice varies as to whether or not the jury charge goes to the jury room,[6] but where under either procedure there lurk shortcomings or dangers in effectively communicating to the jury, the charge should always seek out explicit and clear language in layman's terms. Unfortunately, as has often been said, the trial court writes instructions in terms for the benefit of the appellate court than for the lay jury.

The questioned instruction does attempt to *imply* that "bad purpose" may be an element of the crime by excluding from the meaning of "willful" negligence, inadvertence or mistake or . . . good faith misunderstanding of the requirements of the law." The instruction mentions that willful does include the wrongful purpose of deliberately intending not to file a return when the defendant knew she should file. However, the court prefaces this meaning by saying that "willfully" also means doing something "deliberately and intentionally, and without

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[6] In this circuit, we have recently held that furnishing written instructions to the jury lies within the discretion of the trial court. *See, United States* v. *Johnson*, 466 F.2d 537 (8th Cir. 1972), *cert. denied*, 409 U.S. 1111 (1973).

justifiable excuse."[7] Yet early in *Murdock* the Supreme Court observed that one who acts deliberately and intentionally and without legal justification must still be found not guilty if he did not possess, *in addition,* a state of mind which manifested a bad purpose or evil motive to violate the law. *Murdock* at 397-98.

Here the defendant attempted to justify her failure to file her returns because of the pressing demands of her public and private life. There is no doubt that she did not have a legal justification for failing to comply with the law. The jury was told that if it found the defendant did not have a justifiable excuse for failing to file this alone would be sufficient to convict her. Herein lies the prejudice. Under the charge the jury could have believed the reason Ms. Pohlman gave for failing to file, a reason which negates *mens rea* if believed, and yet have found her guilty. Their verdict could have resulted from a belief that, although this was the reason, it was not justifiable under the law. As discussed, more is required to be culpable under the statute. The jury must find that her failure to file arose from a bad motive and evil intent to commit an illegal act, fully aware of her legal obligation to do otherwise.

Since bad purpose and evil motive are essential elements of willfulness under § 7203, we see no reason that the jury should be afforded the ambiguity of an instruction which possibly denotes otherwise. If these are essential elements of the misdemeanor the jury should be told so in plain and unambiguous terms. As this court reaffirmed in *United States* v. *Achtenberg,* 459 F.2d 91 (8th Cir.), *cert. denied,* 409 U.S. 932 (1972):

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[7] In setting this meaning off from the rest of the instruction the court uses the disjunctive "or".

> "Obviously, if the jury is to function effectively, it must be given a clear statement of each element which the Government must prove. The elements, as expressed in the statute, are hardly set forth with sufficient clarity to permit the jury to perform its duty intelligently. . . ."

Id. at 97, quoting from *Jackson* v. *United States,* 348 F.2d 772, 774 (D.C. Cir. 1965).[8]

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[8]A much preferable instruction is found in another recent Ninth Circuit case, *United States* v. *Klee,* 494 F.2d 394 (9th Cir. 1974):

> The term willfully used in the statute which I have read to you, that is, referring to one who willfully fails to make such a return, means voluntary, purposeful, deliberate and intentionally [sic], as distinguished from accidental, inadvertent, or negligent.
>
> Mere negligence, even gross negligence, is not sufficient to constitute willfulness under the criminal law.
>
> The failure to make a timely return is willful if the defendant's failure to act was voluntary and purposeful, and with the specific intent to fail to do what he knew the law requires to be done; that is to say, with a bad purpose or evil motive to disobey or disregard the law which requires to (sic) file a timely return which discloses to the government facts material to the determination of his tax liability.
>
> There is no necessity that the government prove that the defendant had an intention to defraud it, or to evade the payment of any taxes, for the defendant's failure to file to be willful under this provision of the law.
>
> On the other hand, the defendant's conduct is not willful if you find that he failed to file a return because of negligence, inadvertence, accident or reckless disregard for the requirements of the law, or due to his good faith misunderstanding of the requirements of the law.

494 F.2d at 395.

Judgment reversed and remanded for a new trial.[9]

A true copy.

Attest:

Clerk, U.S. Court Of Appeals, Eighth Circuit.

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[9]Although the defendant represented herself at the trial and in this court and was successful here, we strongly urge her to retain independent counsel in the event this matter is to be retried. The degree of personal involvement by a defendant-lawyer in a criminal proceeding makes it extremely difficult for that person to fairly and objectively evaluate the facts and legal issues. We are confident from the record presented that the defendant's attempt to represent herself before the jury materially prejudiced her case. The written briefs and oral presentation made by the defendant in the present case were disorganized, confusing and difficult for this court to follow. In the event the defendant is without funds, she should investigate with the trial court the possible appointment of counsel under the Criminal Justice Act.

APPENDIX E

TAX RULINGS
With Pocketbook Impact—

How rough will it go on an individual who deliberately fails to file his income-tax return this year? That depends partly on where he lives. In the world of taxes, justice is not always as evenhanded as it might be.

On February 13, the U.S. Court of Appeals for the Eighth Judicial Circuit offered its view of "willful" failure to file in overturning the conviction of a lawyer who had failed to file her returns for three years.

The court said her trial jury had been told that absence of "justifiable excuse" would be "sufficient to convict her," when it should have been instructed that "bad purpose and evil motive are essential elements of willfulness."

On February 24, the U.S. Court of Appeals for the Seventh Judicial Circuit ruled on the appeal of another taxpayer convicted of criminal failure to file. His defense: His trial jury had not been instructed that conviction required a showing of "bad purpose or evil motive," but had been informed that "the only bad purpose necessary for the Government to prove . . . is deliberate intention not to file."

However, this circuit court upheld his conviction, ruling that "willfulness . . . requires only knowledge of a legal obligation to file income-tax returns and an intentional failure to do so."

What it all means—

- If you live in the eighth judicial district—in Arkansas, Iowa, Missouri, Minnesota, Nebraska or the Dakotas—

Internal Revenue would have to show evil intent to get a conviction. A pure heart—or just a reasonable excuse for intentional failure to file—could get you off.

• But if you live in the neighboring seventh judicial district—in Illinois, Indiana or Wisconsin—better be prepared to prove that your failure to file was strictly unintentional.

What if you live elsewhere? People who skip filing must be prepared to take their chances.

Requests for citations to these cases should be addressed to Reader Service, 2300 N Street, N.W., Washington, D.C., 20037.

U.S. NEWS & WORLD REPORT, April 7, 1975

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1371

CHARLES D. MCCORKLE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of willful failure to file income tax returns for the years 1965, 1966 and 1967, in violation of 26 U.S.C. 7203. He was sentenced to three years in prison and fined $10,000.

Petitioner was a court reporter during the years in question. He stipulated that he received gross income of $76,840.87 in 1965; $106,894.06 in 1966; and $121,586.17 in 1967, and did not dispute the fact that he filed no tax returns for those years. Initially, a divided panel of the court of appeals reversed petitioner's conviction on the grounds that he had been improperly restricted in the cross-examination of two Treasury agents and that the trial court's instruction on willfulness failed to advise the jury that it must find that petitioner intended to defraud the government before it could convict (Pet. App. A 1-9). However, on rehearing *en banc*, the court of appeals unanimously affirmed the conviction (Pet. App. B 10-24).

The only question presented to the jury concerned petitioner's willfulness. On that issue the trial judge charged the jury, *inter alia*, as follows (Pet. App. B 12):

> The failure to act is willfully done if done voluntarily and purposefully and with a specific intent to fail to do what the law requires to be done; that is to say, with a bad purpose to disobey and disregard the law. I charge you that the only bad purpose necessary for the Government to prove in this case is the deliberate intention not to file returns, which the defendant knew he was required to file at the time that he was required to file them.
>
> The law does require proof of specific intent before the defendant can be convicted. Now, "specific intent" means more than general intent to commit the act; to establish specific intent the Government must prove, beyond a reasonable doubt, that Charles McCorkle knowingly did an act which the law forbids, purposefully intending to violate the law and knowing that such act would violate the law. Such intent may be determined by you from all of the evidence which has been submitted in this case.

1. Petitioner urges (Pet. 7-9) that the decision approving the above-quoted instruction is in conflict with *United States* v. *Bishop*, 412 U.S. 346; *United States* v. *Murdock*, 290 U.S. 389; and *United States* v. *Pohlman*, 510 F.2d 414 (C.A. 8), (Pet. App. D 26-34).[1] None of these cases, however, casts doubt upon the propriety of the trial

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[1]Petitioner also contends (Pet. 8) that several recent Ninth Circuit decisions erroneously hold that a defendant may be found guilty of willful failure to file an income tax return if he merely acted knowingly or voluntarily. This is not correct. In *United States* v. *Klee*, 494 F.2d 394, 395 n. 1 (C.A. 9), certiorari denied, 419 U.S. 835, the court held that the trial judge was not required to instruct the jury that the government

court's instruction or supports petitioner's contention that the term "willful" must be defined by the trial judge as requiring an "evil motive." In *United States* v. *Bishop, supra*, 412 U.S. at 360, this Court held that the word "willful" in the criminal tax statutes "connotes a voluntary, intentional violation of a known legal duty." The above-quoted instruction of the trial court is in complete accord with the *Bishop* definition of "willful."

Similarly, *United States* v. *Murdock, supra*, does not conflict with the decision below. There, the defendant was charged with willful failure to supply information requested by the Internal Revenue Service. The Court held that the criminal sanction for such conduct did not apply to one whose refusal to give requested information was based upon his *bona fide*, though mistaken, understanding of his constitutional protection against self-incrimination. Since the scope of the privilege was uncertain at the time of the defendant's refusal to supply the summoned information, the Court held that the defendant was entitled to an instruction that the jury should consider whether his conduct was based upon his good faith belief that the privilege was applicable. While the Court in *Murdock* formulated the requirement of willfulness as "bad faith or evil intent"

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must prove "an intent to defraud the government, or to conceal from the government facts relevant to a determination of the accused's tax liability" (494 F.2d at 395). In *United States* v. *Hawk*, 497 F.2d 365, 366-367 n. 2, 369 (C.A. 9), certiorari denied, 419 U.S. 838, the court concluded that the instructions were not fatally defective for failure to advise the jury that it must find the taxpayer had an "evil motive" in failing to file. Accord: *Cooley* v. *United States*, 501 F.3d 1249, 1253 n. 4 (C.A. 9), certiorari denied, 419 U.S. 1123.

Contrary to petitioner's argument, these cases do not hold that a jury may convict simply on a finding that the defendant acted knowingly or voluntarily. In all of these cases, the trial judge instructed the jury, consistent with the requirement of *United States* v. *Bishop, supra*, 412 U.S. at 360, that in order to find that an act or failure to act was willful, the jury must find a voluntary, intentional violation of a known legal duty.

(290 U.S. at 398), nothing in that case requires that the trial court employ those precise words in its instructions to the jury. Indeed, as the Court pointed out in *Bishop* (412 U.S. at 360-361), the *Murdock* definition of willfulness is synonymous with the "voluntary, intentional violation of a known legal duty" standard applied by the trial court in this case. Both formulations are designed to "separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers" (412 U.S. at 361). See also *Cooley* v. *United States*, 501 F.2d 1249, 1253 n. 4 (C.A. 9), certiorari denied, 419 U.S. 1123; *United States* v. *Hawk*, 497 F.2d 365 (C.A. 9), certiorari denied, 419 U.S. 838; *United States* v. *Matosky*, 421 F.2d 410, 412 (C.A. 7), certiorari denied, 398 U.S. 904; *Lumetta* v. *United States*, 362 F.2d 644 (C.A. 8).

Finally, there is no conflict with *United States* v. *Pohlman*, 510 F.2d 414 (C.A. 8). There, the taxpayer's defense to a failure to file charge was that she was so busy with business and personal problems that she did not realize that she had earned sufficient income to require filing a tax return. The portion of the trial court's instruction which the court held to be erroneous stated (Pet. App. D 28):

> The word "willfully" used in connection with this offense means deliberately, and intentionally, *and without justifiable excuse, or* with the wrongful purpose of deliberately intending not to file a return which defendant knew she should have filed * * * . [Emphasis added.]

The Eighth Circuit concluded that the phrase "and without justifiable excuse" may have led the jury to convict the taxpayer even if it believed that her defense negated the requisite specific intent because preoccupation with other affairs is not a justifiable excuse for failure to file a tax re-

turn. However, the phrase "without justifiable excuse" was not used by the trial court in this case so the rationale of *Pohlman* is inapplicable. Moreover, *Pohlman* is not a final decision since the Eighth Circuit has granted rehearing *en banc* in that case.

2. Petitioner further argues (Pet. 10-11) that his cross-examination of two Treasury agents was unduly restricted by excluding testimony concerning parts of conversations between petitioner and the two agents even though the trial court admitted testimony concerning other parts of the conversations during direct examination of the agents. But, as the court below pointed out (Pet. App. B 17), the conversations testified to by the agents on direct examination were admissible as admissions of a party opponent, while the self-serving statements which petitioner sought to bring out were generally inadmissible as hearsay. See *United States* v. *Seyfried*, 435 F.2d 696 (C.A. 7), certiorari denied, 402 U.S. 912. The court, therefore, correctly held that the doctrine of verbal completeness did not entitle petitioner to bring out the whole of the conversations, since irrelevant testimony concerning a conversation need not be admitted simply because testimony describing another part of the conversation is admitted. VII Wigmore, *Evidence*, §2113, p. 524 (3d ed. 1940).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.

DOJ-1975-07

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1371

CHARLES D. MCCORKLE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In our memorandum in opposition (pp. 4-5), we argued that the decision below did not conflict with *United States* v. *Pohlman*, 510 F.2d 414 (C.A. 8). In addition, we noted that *Pohlman* was not a final decision, since the Eighth Circuit had granted rehearing *en banc* in that case.

On August 27, 1975, the Eighth Circuit unanimously reversed the original panel decision in *Pohlman*. Thus, there is no longer any arguable basis for

petitioner's assertion of a conflict with that case. The *en banc* opinion of the court of appeals is set forth in the Appendix to this supplemental memorandum.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1759

UNITED STATES OF AMERICA, APPELLEE

v.

BERENTJE C. M. POHLMAN, APPELLANT

Appeal from the United States District Court
for the District of North Dakota

Submitted: June 11, 1975

Filed: August 27, 1975

Before GIBSON, Chief Judge, LAY, HEANEY, BRIGHT, ROSS, STEPHENSON, WEBSTER, and HENLEY, Circuit Judges, *en banc*.

GIBSON, Chief Judge.

Defendant Berentje C. M. Pohlman was convicted by a jury of willfully failing to file her tax returns for 1968, 1969 and 1970 in violation of 26 U.S.C. § 7203 (1970). On appeal a panel of this court found that the jury had not been properly instructed on the issue of willfulness and reversed her conviction. Thereafter a majority of the judges in active service on this court voted to rehear the case *en banc*, which action vacated the panel opinion. After full consideration by the court *en banc*, we find none of the issues raised by appellant merit reversal and affirm the conviction.

Pohlman, a practicing attorney in Enderlin, North Dakota, according to her testimony at trial had prepared thousands of tax returns and was fully aware of the Internal Revenue Code provisions requiring the filing of tax returns. She, however, did not file her personal returns for the years in question until October, 1972, after a visit by an IRS field auditor. The reasons given at trial were that she was involved in her positions as City Attorney and Mayor of Enderlin in 1969 and 1970 and had some personal problems so that she did not realize until after the filing deadlines that she had income sufficient to require filing. The returns introduced into evidence at trial indicated that in 1968 she had a gross income from her profession of $22,785 and a taxable income of $7,988; for 1969 she had a gross income of $18,452 and taxable income of $3,269; and for 1970 a gross income of $28,896 and $8,278 taxable income.

Error is asserted in the trial court's refusal to give Pohlman's requested instruction on willfulness.[1] The following instruction, substantially identical to that in 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* §52.31 (1970), was given over Pohlman's specific objection:

> The specific intent of willfulness is an essential element of the crime of failure to file an income tax return. The word "willfully" used in connection with this offense means deliberately, and intentionally, and without justifiable excuse, or with the wrongful purpose of deliberately intending not to file a return which defendant knew she should have filed, in order to prevent the Government from knowing the extent of, and knowing the facts material to, the determination of her tax liability.
>
> Defendant's conduct is not "willful" if she acted through negligence, inadvertance, or mistake, or due to her good faith misunderstanding of the requirements of the law. It should be pointed out, however, that disagreement with the law is not a defense. It is the duty of all

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[1] Defendant's requested instruction read:

> 2. Willfulness is an essential element of the crime of which defendant is charged in the indictment. An act is done "willfully" if done purposely with the specific intent to disregard the law, or to do that which the law forbids, and further means an act done with a bad purpose, the existence of specific wrongful intent, and evil motive at the time the crime charged was committed; mere laxity, careless disregard of duty imposed by law, or even gross negligence, unattended by "evil motive," is not probative of willfulness.

> citizens to obey the law whether they agree with it or not.

The panel decision, in agreeing with Pohlman that the trial court's charge did not adequately describe the concept of willfulness, would require the Government to prove not only that the act was done deliberately, intentionally and without justifiable excuse, but additionally that the defendant had a state of mind which manifested a bad purpose or evil motive to violate the law. It thus would allow a defendant to argue that his motive in refusing to file was good, *i.e.*, it was his manner of protest against wasteful governmental expenditures, expenditures that go for inappropriate or evil purposes, or the higher taxation of single taxpayers as was an issue in the present case. We do not think this additional burden is required.

It is undisputed that the words "evil motive or bad purpose" have been used to convey the concept of willfulness embodied in § 7203. *United States* v. *Bishop*, 412 U.S. 346, 360 (1973); *United States* v. *Murdock*, 290 U.S. 389, 398 (1933); *United States* v. *McCorkle*, 511 F.2d 482, 485 (7th Cir. 1975) (*en banc*), *petition for cert. filed*, 17 Cr.L.Rep. 4082 (U.S. May 1, 1975) (No. 74-1371). The Supreme Court in *Murdock* v. *United States*, *supra* at 397-98, did state that:

> The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense.

Additionally, in *Bishop* v. *United States*, 412 U.S. 346 (1973), the Court stated that it would "continue to require, in both tax felonies and tax misdemeanors that must be done 'willfully,' the bad purpose or evil motive described in *Murdock*, *supra*."

We do not read this, however, to indicate that the Court was engrafting onto the statute a requirement that the Government prove anything beyond establishing that defendant's action was deliberate, intentional and without justifiable excuse, or otherwise stated, a voluntary, intentional violation of a known legal duty.[2] In the same discussion in *Bishop*, the latest Supreme Court case in this area, the Court stated:

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[2] The claim that the trial court's instruction does not adequately define willfulness is premised on the use of "without justifiable excuse" when the Supreme Court indicated in *Murdock* that it was not enough for the Government to prove that an action was "without legal justification." We believe that these two concepts are different and that "without justifiable excuse" includes the concept intended by the Court's "bad purpose" or "evil motive" language. An act might well be without legal justification (*i.e.*, the refusal to disclose sources of income in reliance on a nonexistent Fifth Amendment privilege, as in *Murdock*) but could be done with justifiable excuse (*i.e.*, a good-faith reliance on the Fifth Amendment privilege, as in *Murdock*). We think the Supreme Court was concerned in *Murdock* that the Government have to prove that an act was done without justifiable excuse, that is, with a bad purpose or evil motive, and could not rely upon showing the lack of a legal justification to establish willfulness.

However, it must be recognized that clarity and unambiguity are the hallmarks of a good jury instruction. In light of the similarity in language between the two concepts discussed above we think it would be preferable that future in-

> The Court, in fact, has recognized that the word "willfully" in these statutes generally connotes a voluntary, intentional violation of a known legal duty. It has formulated the requirement of willfulness as "bad faith or evil intent," *Murdock*, 290 U.S., at 398, or "evil motive and want of justification in view of all the financial circumstances of the taxpayer," *Spies*, 317 U.S., at 498, or knowledge that the taxpayer "should have reported more income than he did." *Sansone*, 380 U.S., at 353.

Bishop v. *United States*, *supra* at 360.

Thus, rather than indicating that "bad purpose or evil motive" is a requirement to be proved in addition to the voluntary, intentional violation of a known legal duty, the Court's statement indicates that "bad purpose or evil motive" is merely another way to convey the concept of willfulness. *See United States* v. *McCorkle*, 511 F.2d 482 (7th Cir. 1975) (*en banc*).[3]

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structions on willfulness not embody the language of "without justifiable excuse." We would suggest that the first paragraph of the instruction given by the trial court herein be modified to provide that:

> Willfulness is an essential element of the crime of failure to file an income tax return. The word "willfully" used in connection with this offense means a voluntary, intentional violation of a known legal duty, or otherwise stated, with the wrongful purpose of deliberately intending not to file a return which defendant knew she should have filed, in order to prevent the Government from knowing the extent of, and knowing the facts material to, the determination of her tax liability.

[3] The court stated therein:

> Contrary to the defendant's contentions, we believe that the Court employed the terms "bad purpose" and "evil

Cases decided both before and after *Bishop* have been in agreement that "willfully" as used in § 7203 requires only that the Government prove a voluntary, intentional violation of a known legal duty. *United States* v. *McCorkle*, 511 F.2d 482 (7th Cir. 1975) (*en banc*); *United States* v. *Bengimina*, 499 F.2d 117 (8th Cir. 1974); *United States* v. *Hawk*, 497 F.2d 365 (9th Cir.); *cert. denied*, 419 U.S. 838 (1974); *United States* v. *Klee*, 494 F.2d 394 (9th Cir.), *cert. denied*, 419 U.S. 835 (1974); *United States* v. *Matosky*, 421 F.2d 410 (7th Cir.), *cert. denied*, 398 U.S. 904 (1970); *cf. Boardman* v. *United States*, 419 F.2d 110 (1st Cir. 1969), *cert. denied*, 397 U.S. 991 (1970).

The trial court's instruction on willfulness in this case fairly and adequately charged the jury as to what the Government had to establish to support a conviction. There was clearly sufficient evidence for the jury to find that Pohlman's failure to file was a voluntary, intentional violation of a known legal duty.

In addition to the alleged error in instructions, the appellant contends that the court erred in the admission into evidence of conversations with Internal Revenue agents, receiving into evidence photocopies

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motive" as a convenient method of referring to the longer definition of "willfully" as a "voluntary, intentional violation of a known legal duty," and not as engrafting an intent to defraud requirement or other similar evil purpose on that definition.

United States v. *McCorkle*, 511 F.2d 482, 485 (7th Cir. 1975) (*en banc*); *accord, United States* v. *Hawk*, 497 F.2d 365, 368 (9th Cir.), *cert. denied*, 419 U.S. 838 (1974).

of her 1968, 1969 and 1970 returns, and use of hearsay evidence in the cross-examination of appellant.

Agent Engelmann testified to conversations occurring in Pohlman's office on or about October 3, 1972, without informing her of her constitutional right to remain silent. In that conversation she admitted to not having filed the returns. Noncustodial investigation of this type does not require a *Miranda* warning. *United States* v. *MacLeod*, 436 F.2d 947, 950 (8th Cir.), *cert. denied*, 402 U.S. 907 (1971); *United States* v. *Brevik*, 422 F.2d 449, 450 (8th Cir.), *cert. denied*, 398 U.S. 943 (1970); *Muse* v. *United States*, 405 F.2d 40, 41 (8th Cir. 1968), *cert. denied*, 393 U.S. 1117 (1969); *Cohen* v. *United States*, 405 F.2d 34, 35-40 (8th Cir. 1968), *cert. denied*, 394 U.S. 943 (1969).

The appellant's objection to admission of photocopies of her 1968, 1969 and 1970 returns is not well taken. Mr. Engelmann, the IRS Field Audit Agent, testified that these photocopies were the returns which Pohlman signed in his presence October 11, 1972. Although Pohlman had contended that they were merely photocopies of returns she had previously filed, the record establishes that they were adequately identified as being the original returns filed with Engelmann October 11, 1972.

The questioning of Pohlman concerning her prior statements to Internal Revenue agents as to her failure to file returns was not error. The questioning sought testimony as to Pohlman's prior inconsistent

statements. As Pohlman was a party-defendant, her hearsay statements could properly be used against her as admissions. *United States* v. *Pistante*, 453 F.2d 412 (9th Cir. 1971). *See generally McCormick on Evidence* ¶ 239 (1954).

The judgment of conviction is affirmed.

LAY, HEANEY and BRIGHT, Circuit Judges, Dissenting.

We respectfully dissent. The defendant is entitled to a new trial based on the trial court's erroneous instruction.

We sense there exists no fundamental disagreement between the majority and dissenting views herein on *the law* governing the definition of willfulness under § 7203. At issue here is the adequacy of the district court's *instructions*; in other words whether the district court properly conveyed to the jury the necessary elements of the offense under § 7203. The majority concedes lack of clarity in the district court's instruction and suggests modification of the instruction. However, in doing so, it finds no prejudicial error.

In view of the Supreme Court opinion in *United States* v. *Bishop*, 412 U.S. 346 (1973), there should exist no major dispute as to what the term willful means under § 7203. *Bishop* emphasized that an essential element of willfulness is a specific intent to evade the law. The Supreme Court in *Bishop* observed:

> The Court's consistent interpretation of the word "willfully" to require an element of *mens rea*

> implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers.

Id. at 361.

This court in *United States* v. *Bengimina*, 499 F.2d 117 (8th Cir. 1974), recognized that the term willful is consistent with the rule in *Bishop*. Judge Gibson in announcing the court's decision at that time wrote:

> This requirement of willfulness has been formulated as:
>
> "[*B*]*ad faith or evil intent*," *Murdock*, 290 U.S. at 398, or "evil motive *and* want of justification in view of all the financial circumstances of the taxpayer," *Spies*, 317 U.S., at 498, or knowledge that the taxpayer "should have reported more income than he did." *Sansone*, 380 U.S., at 353.

Id. at 119 (emphasis added).

Our earlier panel opinion recognized that it is not essential to include the terms "bad purpose or evil motive" in the definition of willfulness as long as the trial court makes clear that willfulness is a "voluntary, intentional violation of a known legal duty." The panel also recognized that the decisions of *United States* v. *Hawk*, 497 F.2d 365 (9th Cir.), *cert. denied*, 419 U.S. 838 (1974), *United States* v. *Klee*, 494 F.2d 394 (9th Cir.), *cert. denied*, 419 U.S. 835 (1974) and *United States* v. *McCorkle*, 511 F.2d 482 (7th Cir. 1975) (*en banc*), *petition for cert. filed* 17 Cr.L. 4082 (U.S. May 1, 1975) (No. 74-1371) all hold that the statute does not require proof of intent to defraud.

The trial court instructed the jury that the defendant could be convicted if she intended not to file a return when she knew she should file. However the court *also* instructed the jury that the defendant could be guilty under § 7203 if she simply failed to file "deliberately, intentionally and without justifiable excuse." [4] If we correctly understand the reasoning of the majority opinion it is urged that "without justifiable excuse" supplies the missing element of *mens rea*, that is the bad purpose and evil motive not to comply with a known legal duty. The majority reasons that in the future it would be better to abandon the phrase "without justifiable excuse" and instruct specifically that there must be a voluntary and intentional violation of a known legal duty.[5] We

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[4] In setting this meaning of willfulness off from the rest of the instruction the trial court uses the disjunctive "or."

[5] We fail to understand why the language of the majority opinion strains so hard to avoid use of the very language the Supreme Court approved in *Murdock* and *Bishop*. "Bad purpose and evil motive to disobey the law" is clearly an element of the offense and are words easily phrased and understood. A much preferred instruction to the abbreviated version suggested by the majority is approved by the 9th Circuit in *United States* v. *Klee, supra*. The instruction reads:

> The term willfully used in the statute which I have read to you, that is, referring to one who willfully fails to make such a return, means voluntary, purposeful, deliberate and intentionally, [sic] as distinguished from accidental, inadvertent, or negligent.
>
> Mere negligence, even gross negligence, is not sufficient to constitute willfulness under the criminal law.
>
> The failure to make a timely return is willful if the defendant's failure to act was voluntary and purposeful,

agree as to the need for new phraseology, but we respectfully submit the ambiguity resulting from the district court's instruction failed to clearly set forth the necessary requirement of *mens rea* and resulted in prejudicial error to the defendant.

The majority reasons that the term "without justifiable excuse" is simply another way of saying that the jury must find a wrongful purpose to disobey the law. In so doing, the majority distinguishes between "without justifiable excuse" and "without legal justification," asserting that the former is a subjective standard and includes the necessary element of *mens rea*: bad purpose and evil intent. While distinguishing this from the objective standard of "without legal justification" is instructive at this point, no such dis-

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and with the specific intent to fail to do what he knew the law requires to be done; that is to say, with a bad purpose or evil motive to disobey or disregard the law which requires to (sic) file a timely return which discloses to the government facts material to the determination of his tax liability.

There is no necessity that the government prove that the defendant had an intention to defraud it, or to evade the payment of any taxes, for the defendant's failure to file to be willful under this provision of the law.

On the other hand, the defendant's conduct is not willful if you find that he failed to file a return because of negligence, inadvertence, accident or reckless disregard for the requirements of the law, or due to his good faith misunderstanding of the requirements of the law.

494 F.2d at 395 n. 1.

Devitt and Blackmar have recently recommended use of the 9th Circuit instruction. *See* E. Devitt and C. Blackmar, *Federal Jury Practice and Instructions* § 52.31 (Supp. 1975).

tinction was drawn for the jury and they may have confused the two standards.[6]

Herein lies the prejudice. The jury could have believed the reason Ms. Pohlman gave for failing to file, a reason which negates *mens rea*, and yet have found her guilty. Their verdict could have resulted from a belief that, although the defendant's excuse was the reason, it was not justifiable under the law. The statute plainly requires more. The jury must find that her failure to file arose from a bad motive and evil intent not to file a timely return, fully aware of her obligation to do otherwise.[7]

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[6] The term "without justifiable excuse" encompasses at least the term "without legal justification." Even if it also encompasses the requisite bad purpose and evil motive, as the majority argues, there is no way of knowing whether the jury found the bad purpose required by *Murdock* and *Bishop*.

[7] The second paragraph of the challenged instruction does not cure the deficiency created by the ambiguity of the term "without justifiable excuse." It is true that the defendant's conduct is not "willful" under the statute, "if she acted through negligence, inadvertance, or mistake, or due to her good faith misunderstanding of the requirements of the law." However, these criteria are stated as defenses, and do not specifically define the government's burden to show that the defendant must have possessed a wrongful purpose in failing to file. It is imperative for the instruction to clearly convey that the government must bear the burden of proving beyond a reasonable doubt that the defendant had the requisite bad purpose and evil motive to evade the law's requirements. Thus, the second paragraph of the instruction is insufficient to cure the ambiguity of the preceding paragraph.

The first paragraph could have been cured by replacing the "or" with "and." If this were done, the jury would have had to find that the offense was done "deliberately, and intentionally, and without justifiable excuse," (even if considered to

In *United States* v. *McCorkle, supra,* the defendant urged that the trial court failed to instruct that the defendant could not be convicted of willfulness under § 7203 if he possessed a "justifiable excuse." The 7th Circuit disagreed by saying:

> Since the instructions required the jury to find an intentional violation of a known legal duty, it would have been essential for the jury to conclude that McCorkle's conduct was unjustified.

511 F.2d at 486.

However, in this case it was not implicit in the jury's findings that the defendant's reason was unjustifiable that it was also an intentional violation of a known legal duty. An unjustifiable excuse for failure to file does not necessarily inform a layman that it must necessarily be an intentional violation of the law and thus the instruction was deficient.

In *United States* v. *Achtenberg,* 459 F.2d 91 (8th Cir.), *cert. denied,* 409 U.S. 932 (1972) this court emphasized that prejudicial error occurs when the jury is not clearly informed as to the elements of an offense. Our court stated:

> "Obviously, if the jury is to function effectively, it must be given a clear statement of each element which the Government must prove. The elements, as expressed in the statute, are hardly

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mean without legal justification) *and* "with the wrongful purpose of deliberately intending not to file a return which defendant knew she should have filed . . . ." This would have clearly set out the requirement of bad purpose and evil motive.

> set forth with sufficient clarity to permit the jury to perform its duty intelligently . . . ."

Id. at 97, quoting from *Jackson* v. *United States*, 348 F.2d 772, 774 (D.C. Cir. 1965).

It is axiomatic where the instruction is equivocal in a criminal trial the defendant must be given the benefit of doubt as to existing prejudice. *See Bollenbach* v. *United States*, 326 U.S. 607, 613 (1946).

Here the jury was given the alternative of convicting if they found the defendant possessed a wrongful purpose to disobey the law or even if she did not, as long as they found there did not exist a justifiable excuse for her failure to file. This was clear error and Ms. Pohlman is entitled to a new trial.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

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